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**Croft Metals, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Petitioner.**  
Case 15–RC–8393

September 29, 2006

**SUPPLEMENTAL DECISION ON REVIEW AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER  
AND KIRSANOW

On August 7, 2002, the Acting Regional Director for Region 15 issued a Supplemental Decision in the above-captioned proceeding<sup>1</sup> in which he found, inter alia, that the Employer's lead persons are not supervisors under Section 2(11) of the National Labor Relations Act. In accord with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Acting Regional Director's Supplemental Decision.<sup>2</sup> The Petitioner filed a brief in opposition to the Employer's request for review. By Order dated October 24, 2002, the Board (Member Liebman dissenting) granted review solely with respect to the supervisory issue involving the lead persons.<sup>3</sup>

On July 25, 2003, the Board issued a notice and invitation for the filing of briefs in this case and in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006), both of which issued on September 29, 2006. In response to the Board's notice, the parties in the above cases and a number of amici curiae<sup>4</sup> filed extensive briefs with respect to the supervisory issues on review.

<sup>1</sup> Pertinent portions of the Acting Regional Director's Supplemental Decision are attached as "Appendix."

<sup>2</sup> The Employer earlier had filed a request for review of the Acting Regional Director's Decision and Direction of Election that issued on May 1, 2002. On June 21, 2002, the Board issued its Decision on Review, remanding the case to the Acting Regional Director to reopen the hearing to receive additional evidence. See *Croft Metals, Inc.*, 337 NLRB 688 (2002).

<sup>3</sup> Pursuant to the Acting Regional Director's initial decision, an election was conducted on May 29, 2002, and the ballots were impounded.

<sup>4</sup> American Federation of Labor and Congress of Industrial Organizations; American Commercial Barge Line; American Hospital Association et al.; American Nurses Association; American River Transportation Co.; Associated Builders and Contractors; Building and Construction Trades Department, AFL-CIO; Covenant Healthcare System; the General Counsel of the National Labor Relations Board; Golden Crest; Human Resources Policy Association; International Brotherhood of Electrical Workers, Local 4, AFL-CIO; Mariner Health Care Management Co. et al.; Massachusetts Nurses Association; Oakwood

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having considered the record in this case, the parties' briefs, and the amici's briefs, we apply the standard articulated in our decision in *Oakwood Healthcare* and affirm the Acting Regional Director's finding of no supervisory status for the Employer's lead persons. We shall include them in the unit found appropriate by the Acting Regional Director.<sup>5</sup>

**I. FACTS**

**A. Background**

Croft Metals, Inc., the Employer, manufactures aluminum and vinyl doors and windows at its Magnolia manufacturing facility located in McComb, Mississippi. The Employer employs approximately 350 production and maintenance employees and approximately 15 admitted statutory supervisors who supervise the production and maintenance employees. Those statutory supervisors report to a plant manager, who reports to the company vice president and director of manufacturing, Vic Donati. Tim Leonard, the company plant personnel director, is responsible for employee hiring, interviews, and terminations, and he oversees the administration of company policies and procedures.

The Employer also has roughly 25–35 lead persons, some of whom are referred to as Lead Persons "A," Lead Persons "B," Lead Supervisors, and Specialty Lead Persons. Generally, Lead Persons B are less skilled and direct fewer people than Lead Persons A, while Specialty Lead Persons are particularly sophisticated in machinery work. Specialty Lead Persons in the facility's maintenance department handle the maintenance of the plant's equipment and grounds. Lead persons spend a great deal

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*Healthcare, Inc.*; Physicians for Responsible Negotiation; Salt Lake Regional Medical Center, Inc.; Shorefront Jewish Geriatric Center and Metropolitan Jewish Geriatric Center (a division of MJG Nursing Homes, Inc.); United Steelworkers of America, AFL-CIO et al.; and The Chamber of Commerce of the United States.

<sup>5</sup> The Acting Regional Director found appropriate the following unit:

Included: All production and maintenance employees employed at the Employer's Magnolia manufacturing facility, including material inventory clerks, plant clerical employees, inter-plant driver and lead persons.

Excluded: All over-the-road truck drivers, quality control employees, office clerical employees, professional and technical employees, plant nurse, corporate traffic records lead person, corporate traffic records clerk, personnel technician, CAD technician, accounting and payroll clerk, production control clerk, watchmen, guards, and supervisors as defined in the Act.

of their time actually performing hands-on work of the type performed by undisputed unit employees.<sup>6</sup>

Lead persons are hourly paid and punch a time clock just like regular rank-and-file production and maintenance employees;<sup>7</sup> admitted supervisors are salaried and do not punch a time clock. Lead persons enjoy the same benefits and privileges that rank-and-file employees enjoy; admitted supervisors, however, enjoy some benefits that lead persons do not. Lead persons are not invited to attend the company's daily supervisory meetings, but not every admitted supervisor is invited either. Lead persons are not designated as "supervisors" on the company's payroll or seniority documents. In fact, for nearly 30 years until the filing of the instant petition, lead persons had been included in a bargaining unit with the rank-and-file production and maintenance employees and had been subject to successive collective-bargaining agreements that had been negotiated by the Employer with another union (not the Petitioner) on behalf of the unit.

#### *B. Alleged Supervisory Authority*

In its request for review, the Employer asserts that Lead Persons A and B, Lead Supervisors, and Specialty Lead Persons in Maintenance have supervisory authority to assign production and maintenance employees, direct these employees in the performance of tasks, effectively recommend these employees for hire, effectively recommend discipline and discharge of these employees, and/or participate in the evaluation process for these employees. A summary of the relevant facts pertaining to each category of alleged supervisory authority follows.

##### *1. Assignment of Employees*

The Employer uses a posted work schedule, which is not prepared by lead persons, to notify employees where and when to report to work. Lead persons do not assign employees to production lines or departments or to shifts or overtime periods. Lead persons do not assign employees to their job classifications, e.g., glaziers, back-builders, material handlers, framers, screen rollers, and level 2 operators. Each shift, lead persons receive from their supervisors a list of projects to accomplish that day. The employees allocated to the lead persons generally perform, consistent with their classification, the same task or job on the line or in their department every day. Lead person Charles Coleman testified that if a lead has

had a steady crew for a while and there are no absences, then employees generally do the same work every day, and the assignment of employees to particular jobs is "pretty routine," day in and day out. Occasionally, a lead person may switch tasks among employees on his line or in his crew during the shift, but the record does not establish how frequently this occurs. During the course of the shift, the lead persons may direct the employees as necessary to ensure that the projects are completed on a timely basis.

There is a fair amount of employee turnover in the plant, and problems with production lines or employee absences sometimes arise. When a production line is shorthanded and/or an employee is sent from his regular line to another lead person's line, then the lead person must tell the employee what jobs to perform and may shift other employees accordingly. The record does not reflect how often this occurs or whether or not the substitutes typically just fill in for the missing worker. Often the lead person will fill in and do the work. He may also notify his supervisor about the problem and ask for a replacement or additional personnel. The lead person's supervisor, not the lead person, decides whether to borrow or temporarily transfer an employee from another part of the plant to substitute for the absent employee.

##### *2. Direction of Employees*

Lead persons oversee production in the area to which they are assigned, and have the authority to make decisions about the order in which the work is to be performed and to determine who on the crew is to do which tasks. For instance, Lead Person Nolan Carmel testified that he had only three individuals working with him on the vinyl patio door assembly line, and he sometimes moves them from one task to another in an effort to improve production on the line. As noted above, lead persons receive from their supervisors a list of projects to accomplish each day, and then allocate work, as necessary, to ensure that the day's goals are met. For instance, the maintenance manager may give the specialty lead person a project to repair doors on an airplane hanger or to do preventive plant maintenance or to rebuild utility vehicles. With respect to the production lines, the lead person receives a list of what product is going to be run on that line that day from production control via the lead person's supervisor. The lead supervisor in shipping will have employees load the trucks according to a pre-arranged schedule of customer orders to be shipped that day. The lead supervisor and his crew load the trucks by product type, with the largest products towards the front of the truck, followed by the doors, and the loose items

<sup>6</sup> The preponderance of the evidence does not support the Employer's claim that lead persons spend only a small fraction of their time performing such work.

<sup>7</sup> Some lead persons are paid more than rank-and-file employees, and some lead persons opined that this was so because they had greater responsibilities. It is also undisputed that some rank-and-file employees make more than, or the same as, lead persons.

placed last, near the truck's back door.<sup>8</sup> Several lead persons described both the work performed by their crews and any direction given by the lead persons to employees as "routine" in nature.<sup>9</sup>

Lead persons are expected to and authorized to correct job performance and instruct employees in the proper assembly technique on the line, loading of the over-the-road trucks, or repair or preventive maintenance on small construction projects. Load Supervisors Carmel, Holmes, and Martin gave examples of the kind of instructions that they give their crews. These included where and how to put items on a truck, to go get needed items, or to perform a task in a certain order or way.<sup>10</sup>

The Employer's written job bid descriptions for lead person positions include the following duties: "direct[ing] the activities of all employees" in the lead person's assigned area, "continually monitor[ing] activities utilizing each employee's capabilities to insure smooth flow and optimum output," "insur[ing] that all employees are at their assigned work stations and begin work in a

timely manner at the start of the shift or work period," and "insur[ing] that all employees continue working until the end of the shift or work period."

To insure that the lead persons carry out their responsibilities to their assigned line or department, the Employer has disciplined lead persons because of the failure of their crew to meet production goals or because of other shortcomings of the crew. One load supervisor testified that he had been warned when it took too long for two trucks to be loaded. The Employer also furnished written disciplinary warnings issued to several lead persons who failed to correct poor performance by their crew members.<sup>11</sup> Those warnings make clear that lead persons are held accountable for the level and quality of production on their lines, and are expected to monitor production, correct problems as they occur, and insure that employees remain busy.

### 3. Hiring Recommendations

Lead persons are not involved in hiring employees or the interview process. They play no role in determining where new production and maintenance employees will work in the plant. Lead persons have recommended persons for hire whom the Employer has hired, but the Employer has also hired persons recommended by rank-and-file employees. Personnel Director Leonard testified that although he places more weight on a lead person's hiring recommendation than a rank-and-file employee's hiring recommendation, he still interviews the prospective hire, and the hiring process is the same in both instances.

### 4. Discharge and Discipline Recommendations

Lead persons have no authority to discharge employees. Personnel Director Leonard testified that even supervisors cannot fire employees. Leonard testified that the Employer once fired an employee based on a lead person's report that the employee was insubordinate. However, he acknowledged that he independently interviewed the employee prior to the termination. According to Leonard, lead persons can "begin the process" of discipline and bring employees to personnel. Though he testified that lead persons can recommend discipline, he admitted that he had not found any written discipline signed by lead persons, and that he independently investigates all recommendations for discipline.

<sup>8</sup> As an example, Load Supervisor Leo Holmes testified that he spends his day working with a crew of three other employees. One employee brings the merchandise to the truck; Holmes counts and scans the merchandise; and the other two employees stack the merchandise inside the truck.

<sup>9</sup> Load Supervisor Holmes testified that he tells people where and how to put material on trucks, that he has been doing this for a "pretty good while," and that this was "routine on a daily basis for him."

<sup>10</sup> The relevant excerpts from the testimony of Carmel, Holmes, and Martin are the following:

Hearing Officer: Do you tell them what to do or do you –

Carmel: Yes. I tell them, but, see, we ain't got enough people, so I have to tell them, and then I pitch in and help out, to get stuff out.

\* \* \*

Petitioner: Okay. Now, are you telling –giving instructions to the other three employees [in your shipping crew] as you're doing this [loading of the truck]?

Holmes: Yes.

Petitioner: What kind of instructions would you be giving them?

Holmes: Where to put it and how to put it.

Petitioner: Okay. And you've been doing this for a long time.

Holmes: Pretty good while.

Petitioner: Okay. Is this routine on a daily basis for you?

Holmes: Yes.

\* \* \*

Hearing Officer: When you say you tell them what to do, give me an example of the instructions you give them.

Martin: Like I tell them to go get some bands; we need two bands to band stuff off. I need a window or a door or something like that, you know, like that.

Hearing Officer: You tell them to go get it?

Martin: Yes.

Hearing Officer: How do you decide who's going to go get it?

Martin: I get the one who do [sic] the work most. I tell the person who know[s] the job most.

<sup>11</sup> For example, the Employer warned a lead person because the plant manager had observed his line at a standstill, not producing to requirements. Another lead person was warned for failing to "correct problems when they occur on his line" and for failing to "move people to correct the problem." Another lead person was repeatedly warned for unacceptable productivity. Another lead person was warned because "[h]is employees" were not staying busy and were not at their work stations.

Lead persons Carmel, Coleman, Holmes, Lewis, and Martin denied that they had either disciplined or could discipline employees. Holmes testified that his complaints about employees have never led to written warnings or other types of discipline. Lead Person Ronald Tate testified that while he does not issue written warnings, he has verbally warned employees for failing to wear protective equipment. According to Tate, if the employee still won't wear it, he takes the employee to his superior. He testified that if employees don't do what he tells them, he reports it to his superior, and "Once I tell her, I'm out of it then."<sup>12</sup>

Vice President Donati provided conflicting evidence about the lead persons' involvement in the discipline of employees. He testified that the specialty lead persons in maintenance have disciplined employees, but could not recall the specifics. He also testified that if a disciplinary problem occurs on a line and a supervisor is not around, the lead person brings the individual in question to the personnel office. He stated that the personnel office would investigate the incident before taking action, but later claimed that personnel would accept the lead person's version of what happened. He also stated that by and large, supervisors rather than lead persons sign written warnings and that lead persons have written warnings for supervisors' signatures.

#### 5. Evaluation of Employees

Production and maintenance employees are evaluated yearly, but the annual evaluations are not used for purposes of wage increases, promotions, or awards. There was conflicting testimony about the lead persons' authority to evaluate employees. On the one hand, Vice President Donati testified that lead persons do not fill out and sign evaluation forms. Similarly, a lead person testified that he does not evaluate employees, and another lead person testified that he has refused to evaluate employees without any disciplinary repercussion. On the other hand, Personnel Director Leonard testified that lead persons in some areas of the plant actually complete evaluation forms and sign the evaluations; in other areas, lead persons just report their impressions to supervisors; while in still other areas the supervisors evaluate employees by themselves. Leonard claimed that Lead Person Anderson evaluated three employees on his own, but he admitted that Anderson's evaluations were not used for awarding any wage increases, promotions or rewards to employees.

<sup>12</sup> The record gives no indication what Tate's superior did with such reports or whether Tate's verbal reprimands could initiate the Employer's disciplinary process.

#### II. THE ACTING REGIONAL DIRECTOR'S FINDINGS

The Acting Regional Director found that none of the lead persons were supervisors within the meaning of Section 2(11) of the Act. His decision does not discuss in much detail either the assignment or direction functions, but concludes that the evidence failed to establish that "the lead persons have the independent authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward employees, adjust their grievances, or to effectively recommend any of the foregoing." The decision states that although the lead persons "are responsible for work within their departments, the evidence fails to establish that they use independent judgment in directing the work of other employees." The Acting Regional Director concluded that the lead supervisors do not use independent judgment in loading trucks because "the loading of the truck is essentially dictated by the delivery schedule." As to employee hiring, he found that the record did not establish that the Employer gives any greater weight to recommendations made by lead persons or that it had ever based a decision to hire solely upon the recommendation of a lead person. With regard to employee discipline, the Acting Regional Director found that although "lead persons may report incidents of misconduct, the Employer conducts its own independent investigation before deciding what action, if any, to take." As to employee evaluations, the Acting Regional Director concluded that the evaluations do not impact upon the employees' terms and conditions of employment.

#### III. ANALYSIS

We find, for the reasons given by the Acting Regional Director, that the Employer failed to show that the lead persons' role, if any, in the hiring, discipline, discharge, and evaluation of employees satisfies the definition of "supervisor" set forth in Section 2(11) of the Act. We also find, applying the standards articulated in *Oakwood Healthcare*, 348 NLRB No. 37 (2006), that the Employer failed to establish that the lead persons possess the authority to "assign" within the meaning of Section 2(11). In addition, while we find that the lead persons have the authority "responsibly to direct," we conclude that the Employer has failed to demonstrate that such direction by the lead persons involves a degree of discretion that rises above the "merely routine or clerical." Thus, such direction does not entail the use of independent judgment within the meaning of Section 2(11).

Section 2(11) of the Act defines "supervisor" as

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other

employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Pursuant to this definition, individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., “assign” or “responsibly to direct”) listed in Section 2(11); (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) their authority is held “in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. “[T]he burden of proving supervisory status rests on the party asserting that such status exists.” *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); accord *Kentucky River*, 532 U.S. at 711–712 (deferring to existing Board precedent allocating burden of proof to party asserting that supervisory status exists). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Dean & Deluca*, 338 NLRB at 1047; *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

The Board in *Oakwood Healthcare* examined whether the acute care hospital charge nurses at Oakwood Heritage Hospital were statutory supervisors based on the charge nurses’ role in assigning nursing personnel to patients and directing the nursing staff in the performance of their duties. The Board majority found that Oakwood’s permanent charge nurses were 2(11) supervisors because they had the authority to “assign” and exercised independent judgment in making these assignments in the interests of their employer. 348 NLRB slip op. at 9–10, 13. The Board also found that the hospital had failed to carry its burden of proving that the charge nurses responsibly directed employees within the meaning of Section 2(11). *Id.* slip op. at 10. In making these findings, the Board majority refined the analysis to be applied in assessing supervisory status and adopted the following definitions for the terms “assign,” “responsibly to direct,” and “independent judgment” as those terms are used in Section 2(11) of the Act.

The authority to “assign” refers to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. . . . In sum, to ‘assign’ for purposes of Section 2(11) refers to the . . . des-

ignation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task.” *Id.* slip op. at 4.

The authority “responsibly to direct” is “not limited to department heads,” but instead arises “[i]f a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ . . . provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” *Id.* slip op. at 6. “[F]or direction to be ‘responsible,’ the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly.” *Id.* slip op. at 7. “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.* slip op. at 7.

“[T]o exercise ‘independent judgment,’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* at 8. “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* slip op. at 8. “On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” *Id.* slip op. at 8 (citations omitted). Explaining the definition of independent judgment in relation to the authority to assign, the Board stated that “[t]he authority to effect an assignment . . . must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” *Id.* slip op. at 8 (citations omitted).

In this case, the Employer has failed to adduce evidence sufficient to establish that the responsibilities carried out by the lead persons meet the *Oakwood Healthcare* definition of “assign.” The lead persons do not prepare the posted work schedules for employees, appoint employees to the production lines, departments, shifts, or any overtime periods, or give significant overall duties to employees. For the most part, the lead persons work along side their regular line or crew members who per-

form, consistent with their classifications, the same task or job on the line or in their department every day. If a regular employee is absent, the lead persons have no choice or flexibility concerning the personnel, if any, assigned to them, nor do they control whether or for how long the replacement will remain. Frequently, the lead persons themselves just fill in to pick up the slack. Any temporary work assignments under such circumstances are dictated largely by what work the replacement is capable of performing. Similarly, if an employee quits, the lead persons must simply accept a replacement selected and hired by others to fill in the crew void. The record does reflect that the lead persons sometimes switch tasks among employees assigned to their line or department in order to finish projects or achieve production goals, but the frequency with which that occurs is not shown. Moreover, the record is largely devoid of testimony concerning the factors, if any, taken into account by the leads in reallocating work in such circumstances. In any event, the occasional switching of tasks by the lead persons here does not implicate the authority to “assign” as that term is described in *Oakwood Healthcare* because the activity does not constitute the “designation of significant overall duties . . . to an employee.” *Id.* slip op. at 4. This sporadic rotation of different tasks by the lead persons more closely resembles an “ad hoc instruction that the employee perform a discrete task” during the shift and as such is insufficient to confer supervisory status on the lead persons pursuant to Section 2(11) under *Oakwood Healthcare*. *Id.*

The preponderance of the evidence does support a finding that the lead persons “responsibly direct” their line or crew members as that 2(11) term is defined in *Oakwood Healthcare*. As part of their duties, the lead persons are required to manage their assigned teams, to correct improper performance,<sup>13</sup> move employees when necessary to do different tasks, and to make decisions about the order in which work is to be performed, all to achieve management-targeted production goals. Lead persons instruct employees how to perform jobs properly, and tell employees what to load first on a truck or what jobs to run first on a line to ensure that orders are filled and production completed in a timely manner. Thus, the lead persons direct individuals when they decide “what job shall be undertaken next [and] who shall

do it.” *Id.* slip op. at 6. As part of their duty to oversee the production in their area, the lead persons are also held accountable for the job performance of the employees assigned to them. The record reveals that the Employer has disciplined lead persons by issuing written warnings to them because of the failure of their crews to meet production goals or because of other shortcomings of their crews. This specific showing of “some adverse consequence [befalling the lead persons] providing the oversight if the tasks performed are not performed properly” adequately satisfies the *Oakwood Healthcare* “accountability” standard for purposes of responsible direction.

The remaining question is whether the Employer has carried its burden of proving that the lead persons’ responsible direction of employees is exercised with independent judgment and involves a degree of discretion that rises above the “routine or clerical.” The short answer is no. The sparse evidence put forward by the Employer with respect to the discretion exercised by lead persons in directing other employees actually undermines the Employer’s position. For example, the testimony reflects that, in loading trucks, the lead persons follow a pre-established delivery schedule and generally employ a standard loading pattern that dictates the placement of different products in the trucks. Proffered examples of instructions given to employees by lead supervisors consisted of matters such as “where to put it and how to put it,” and directions to retrieve loading bands or missing items slated for delivery. Similarly, the Employer’s evidence regarding the production and maintenance employees indicates that such employees generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance. The Employer’s own witnesses, to the extent that they testified about the lead persons’ judgment involved in directing the crews, described such directions as “routine.” The Employer adduced almost no evidence regarding the factors weighed or balanced by the lead persons in making production decisions and directing employees. Thus, we cannot conclude that the degree of discretion involved in these activities rises above the routine or clerical.<sup>14</sup> Accordingly, we find no statutory supervisory status for Lead Persons A and B, Load Supervisors, and Specialty Lead Persons in Maintenance and shall include these individuals in the unit.

<sup>13</sup> Though we agree with the Acting Regional Director that the record evidence was too equivocal to establish that lead persons possess the independent authority to discipline or to effectively recommend discipline of employees within the meaning of Sec. 2(11), witnesses did testify that lead persons would take corrective action such as verbal warnings or escorting non-compliant employees to the company’s personnel office or higher plant supervisors.

<sup>14</sup> Cf. *Bowne of Houston*, 280 NLRB 1222, 1223 (1986) (“[T]he exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status.”); see also *Franklin Home Health Agency*, 337 NLRB 826, 831 (2020) (“The degree of independent judgment is reduced when directing employees in the performance of routine, repetitive tasks.”).

## ORDER

The Acting Regional Director's Supplemental Decision is affirmed with respect to the supervisory issue on review. The case is remanded to the Regional Director for further proceedings consistent with this Supplemental Decision, including the opening and counting of the ballots of all eligible voters, preparing a tally of ballots, and issuing the appropriate certification.

Dated, Washington, D.C. September 29, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

[T]he Employer contends that the lead persons are supervisors within the meaning of Section 2(11) of the Act. There are 25 to 30 lead persons who report directly to one of the admitted supervisors. The lead persons fall into the classifications of load supervisor, specialty lead person, lead person (A), and lead person (B). The load supervisor is responsible for loading the merchandise on trucks for shipping to customers. Typically, the specialty lead person is an individual assigned to one of the various higher technical departments, which include the tool room, extrusion department, and machine shop.<sup>5</sup> In comparison to lead person "B," the lead person "A" is a higher-level lead person.

## a. Load supervisors

Employee Leo Holmes testified that he is employed by the Employer as a lead person "A" in the shipping department and is sometimes referred to as a load supervisor. Holmes is one of four employees assigned to a particular truck. One employee brings the merchandise to the truck; Holmes counts and scans the merchandise; and the other two employees stack the merchandise inside the truck. Holmes spends his day working at the truck's location with the other three employees. He receives an

<sup>5</sup> It appears that other departments have specialty lead persons assigned to them, but the record is silent as to the name of these departments. In addition, the record is silent as to the total number of specialty lead persons employed by the Employer.

order indicating how a truck is to be loaded. When the truck has to make more than one delivery, merchandise is loaded on the truck in the order of the delivery schedule. On a daily basis, Holmes instructs three employees on where and how to place the merchandise.

Holmes testified that he has a higher pay rate than the other three employees he works with but that he was uncertain as to how much the other three employees earn. The record is silent as to Holmes' rate of pay.

Holmes' supervisor is Wilma Martin. For at least 3 months, she has not worked due to an illness. He believes that Plant Manager Harvey Driver has filled in for Martin during this period.

Holmes does not have the power to grant time off, hire, fire, discipline, transfer, lay off, or recall from lay-off any employee. He is not involved in the process of interviewing individuals for employment and plays no role in determining where new employees will work. He does not attend supervisors' meetings. Although Holmes is not involved in the evaluation process for probationary employees, his supervisor has asked for his recommendation as to whether a probationary employee should be retained. However, he does not recall any time in which his supervisor agreed with his recommendation. However, he recalls recommending that the Employer not retain certain employees and asserts that the Employer, nonetheless, elected to retain those individuals. In calendar year 2002, the Employer has not asked Holmes for his recommendation concerning the retention of probationary employees.

Holmes has never verbally reprimanded employees regarding their work. In the past, Holmes has complained to his supervisor about some of the workers in his crew. To his knowledge, none of his complaints have resulted in any of the employees receiving a written warning or any other type of discipline.

Finally, Holmes has been a lead person "A" for the last 17 years, and during this 17-year period, was a member of the bargaining unit that was previously represented by Carpenters Local 2280.

Employee James Martin testified that he is a load supervisor and that he earns \$9.30 an hour. He spends a normal day working with his hands loading trucks. He has a crew that works with him; however, the record is silent as to the number of employees in his crew or their hourly rates of pay. He gives his crew instructions on how to load a truck and loads the product in a manner to ensure it is not damaged in transit. He learned how to load trucks through experience.

As is the case of Holmes, Wilma Martin is James Martin's supervisor. James Martin does not have any extra duties when Wilma Martin is not at work.

He does not attend supervisors' meetings, check time records, interview applicants, or hire employees. He has never disciplined employees or recommended their discipline nor does he have the authority to discipline.

b. Specialty lead persons

The Employer presented evidence regarding three specialty lead person positions. Employees occupying these positions work in the tool room, the extrusion department, and the maintenance department.<sup>6</sup>

With regard to the specialty lead person(s)<sup>7</sup> in the tool room, Vice President of Human Resources Vic Donati testified that those filling this position have technical knowledge of the tool room that was acquired over a long period of time. He provided no details concerning how that knowledge was acquired. The Employer presented no evidence concerning any specific supervisory duties and/or functions of the individual(s) occupying this position.

With regard to the specialty lead person(s) in the extrusion department, Donati testified that the job duties for this position have evolved over time. In this regard, while those occupying this position formerly supervised production employees, they are now chiefly responsible for the actual operation of the presses and ovens in the extrusion department. Donati further testified that over the years, the Employer has paid to send the specialty lead person(s) to training seminars in preventive maintenance, the operation of oil gear, and the use of the dye shop. The record contained no testimony or evidence as to any specific supervisory duties or functions of the individual(s) occupying this position.

With regard to the specialty lead persons in the maintenance department, Donati testified that these employees handle the maintenance of the plant's equipment and grounds. He further testified that these individuals are similar to crew foremen in that they assign work to employees. The maintenance department specialty lead persons report to the maintenance supervisor.<sup>8</sup> There are currently twenty (20) employees assigned to the maintenance department under the direction of one maintenance supervisor.<sup>9</sup> The maintenance supervisor is responsible for the large construction projects and repairs, while the

specialty lead persons handle work and repairs on small construction projects. The Employer asserts that the maintenance specialty lead persons earn over 46 percent more per hour than the highest paid production employees admittedly included in the unit. However, the record does not show the hourly rate of pay for the maintenance specialty lead persons.

Donati testified that the maintenance specialty lead persons have the authority to discipline members of their crews. However, he could not recall any specific instances in which a maintenance specialty lead person exercised this authority. The record contains no evidence as to whether the maintenance department specialty lead persons have the power to grant time off, fire, transfer, lay off, or recall from layoff any employee. In addition, there was no evidence presented as to whether the maintenance specialty lead persons are involved in the process of interviewing individuals for employment or selecting applicants or employees to work on their crews. Finally, the record contains no evidence as to whether the maintenance specialty lead persons are involved in the process of evaluating crew members.

c. Lead persons "A" and "B"

The lead persons "A" and "B" are hourly employees who punch a timeclock.<sup>10</sup> During the term of the Employer's collective-bargaining relationship with Carpenters Local 2280, the lead person "A" and lead person "B" classifications were bargaining unit positions. In accordance with the practice established in the collective-bargaining agreement between the Employer and Carpenters Local 2280, vacancies for these positions are posted and bid<sup>11</sup> upon by hourly employees. If there is not a qualified bidder from within the company, the Employer may hire someone from outside to fill the vacancy.

Lead persons "A" and "B" receive the same benefits as hourly employees stipulated to be in the unit. Admitted supervisors, on the other hand, receive some benefits that are not available to hourly employees. The record is silent as to what these benefits are.

Lead persons "A" and "B" do not hire, fire, transfer, lay off or recall from layoff any employees. The record reflects that lead persons "A" and "B" have recommended for hire individuals who were hired by the Employer. However, Plant Personnel Director Leonard testified that any employee could recommend an individual for hire and that the Employer has hired individuals who were recommended by rank-and-file employees. The

<sup>6</sup> The Employer also testified that there was another specialty lead person called the corporate traffic records clerk. After the Employer presented evidence regarding this position, the parties stipulated that the corporate traffic records clerk should be excluded from the bargaining unit. I hereby approve this stipulation.

<sup>7</sup> The record is silent as to the number of specialty lead persons assigned to the tool room.

<sup>8</sup> The maintenance supervisor is an admitted supervisor.

<sup>9</sup> Donati did not know the exact number of specialty lead persons assigned to the maintenance department but he believed the number is less than 5.

<sup>10</sup> All the hourly employees punch a timeclock. Supervisors are salaried employees and do not punch in or out.

<sup>11</sup> Supervisors are not selected through the bidding process.



lead persons are not involved in the process of interviewing individuals for employment. There is no evidence that they make the schedules for employees and they lack the authority to grant time off.

Plant Personnel Director Leonard testified that employees are evaluated yearly. The record shows that some lead persons have evaluated employees' performance. Employer Exhibit 17 reflects that lead person Oliver Anderson evaluated Robert Patterson on July 31, 2001, and May 23, 2002. Anderson also evaluated another employee on June 27, 2002, and reviewed the evaluation of yet another employee on March 26, 2001. Likewise, lead person Earlisha Matthews evaluated three separate employees on May 22, 2001. Lead person John Mintin reviewed another individual's evaluations of two employees on November 6, 2001. Plant Personnel Director Leonard testified that Oliver Anderson has been a lead person for three years and that he evaluates the three other employees who work in his area. The record is silent as to how long Earlisha Matthews and John Mintin have been lead persons and the number of employees assigned to their respective work areas. Although there are approximately 25 to 30 lead persons, the evidence reveals that only the above-named three lead persons have participated in employee evaluations. There was no documentary evidence presented of any other lead persons participating in the evaluation process. Further, Leonard testified that to the best of his knowledge, none of the evaluations were used to grant promotions or awards.

Lead persons "A" and "B" do not discipline employees. However, when there is an incident that may result in discipline, they may take the employee(s) involved to the personnel office for appropriate action. The personnel office investigates the incident and takes the appropriate action.

Lead persons "A" and "B" are responsible for ensuring that the production lines run properly. If machinery needs repair, they may call the maintenance department to make the repair. Leonard testified that there are some departments in which the department supervisor is not physically present in the department and, as such, the lead person runs the department. However, Leonard did not name these departments or the lead persons and the record does not otherwise reflect this information. Further, the record is silent as to the meaning of "running" these departments.

If a person on the production line is ill, the lead person may allow him to leave the line to receive first aid. The Employer asserts that the lead persons have the authority to permit employees to leave work early. However, Donati testified that in most cases, the lead persons must

check with an admitted supervisor before allowing an employee to leave work. The record contained no examples of any instances in which lead persons "A" or "B" exercised independent judgment in granting time off.

The record shows that some lead persons have signed "punch detail reports," which essentially set forth when employees punch in and out. The payroll clerk uses the "punch detail reports," to calculate employees' pay. However, Leonard further testified that not all lead persons sign these reports. Also, at least one rank-and-file employee, Nettie Johnson, has signed these reports.

The record shows that some lead persons have been issued written warnings because the lead person's production line failed to produce in accordance with the Employer's expectations.

Charles Coleman testified that he has been a lead person for the last 10 years. For the last 6 years, he served as the president of Carpenters Local 2280. Coleman currently works on the 1600 line, which makes doors. Coleman testified that 90 to 98 percent of his time is spent working on the line making doors. Although Coleman testified that he gives instructions to employees on the line, he gave no details regarding the instructions he gives or the factors involved in determining what those instructions will be.

Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1863, 1867 (2001), the Supreme Court approved the Board's well-established precedent that the party asserting supervisory status has the burden of proof to establish such status. A statutory supervisor must possess at least one of the indicia specified in Section 2(11) of the Act. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. at 1867; *Queen Mary*, 317 NLRB 1303 (1995); *Allen Services Co.*, 314 NLRB 1060 (1994). Moreover, a statutory supervisor must exercise supervisory indicia in a manner requiring the use of independent judgment. The Supreme Court agreed with the Board that independent judgment is ambiguous and that many nominal supervisory functions may be performed without the exercise of such a degree of judgment or discretion as would warrant a finding of supervisory status under the

Act. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. at 1867. If the functions set forth in Section 2(11) are exercised in a routine, clerical, perfunctory or sporadic manner, then supervisory status is not conferred. *Bowne of Houston, Inc.*, 280 NLRB 1222 (1986). Isolated and infrequent incidents of supervision do not elevate a rank-and-file employee to supervisory level. *NLRB v. Doctors' Hospital of Modesto*, 489 F.2d 772, 776 (9th Cir. 1973). Employees who are merely conduits for relaying management information to other employees are not supervisors. *Bowne of Houston, Inc.*, supra. The Board will not consider titles alone to be determinative of supervisory status. *Marukyo U.S.A., Inc.*, 268 NLRB 1102 (1984). The Board also is careful not to construe supervisory status too broadly because a worker who is found to be a supervisor loses his organizational rights. *Bay Area-Los Angeles Express*, 275 NLRB 1063 (1985); *McDonnell Douglas Corp v. NLRB*, 655 F.2d 932 (9th Cir. 1981).

Applying these principles to the instant case, I find that the Employer has failed to meet its burden of demonstrating that the lead persons are statutory supervisors. The record fails to establish that the lead persons have the independent authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward employees, adjust their grievances, or to effectively recommend any of the foregoing. With regard to discipline, although Coleman has made complaints regarding coworkers, there is no evidence that these complaints resulted in any personnel action. Similarly, although other lead persons may report incidents of misconduct, the Employer conducts its own independent investigation before deciding what action, if any, to take. The Board has held that the mere reporting of misconduct does not confer supervisory status if an employer conducts its own investigation prior to imposing discipline. *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998). Although the lead persons are responsible for work within their departments, the evidence fails to establish that they use independent judgment in directing the work of other employees.<sup>12</sup>

<sup>12</sup> In its brief, the Employer cites *Aurora & East Denver Trash Disposal*, 218 NLRB 1, 10 (1975), for the proposition that a foreman who claimed he was a mere conduit for the employer's orders to employees was a supervisor where he led other employees to believe he was one. That case is distinguishable. In that matter the foreman was instrumental in the termination of two employees and the owner of the company sought the foreman's opinion regarding whether or not to hire applicants for employment. In the instant case, lead persons are not instrumental in terminating employees and the supervisors do not seek their opinion regarding the hiring of applicants. The Employer also cites *Gerbes Super Market*, 213 NLRB 803, 806 (1974), for the proposition that a department manager was a supervisor where he was regarded by fellow employees as their "boss." In that case, all the department employees testified that the department manager was their boss and that he

Holmes does not use independent judgment in loading trucks, instead the loading of the truck is essentially dictated by the delivery schedule. The evidence further fails to establish that the lead persons make employee schedules or give employees permission to come in late, take a day off, or leave early. The record indicates that both rank-and-file employees and lead persons may recommend individuals for employment. The record does not establish that the Employer gives any greater weight to recommendations made by lead persons or that it has ever based a decision to hire solely upon the recommendation of a lead person. While some lead persons have signed time reports, the Board has held that this function is routine in nature and does not confer supervisory status. *John Cuneo of Oklahoma, Inc.*, 238 NLRB 1438, 1439 (1978). Further, as earlier noted, rank-and-file employees have also signed time reports. With respect to the lead persons' role in the evaluation process, the Board has held that the authority to evaluate employees does not elevate one to a supervisory level where those evaluations do not impact upon employees' terms and conditions of employment. *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995).

Accordingly, I find that the authority of the lead persons is insufficient to render them Section 2(11) supervisors. I will, therefore, include them in the unit.

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gave them permission to take whole and half days off from work. In the instant case, none of the rank-and-file employees testified that they consider the lead persons to be bosses. In addition, the lead persons cannot give employees permission to take any time off. In addition the Employer cites *NLRB v. McCullough Environmental Services*, 5 F.3d 923 (5th Cir. 1993), for the proposition that an indicator of supervisory authority is whether other employees routinely seek out the individuals alleged to be supervisors for assistance in performing their duties. This case involved the issue of whether lead operators were supervisors. The facts established that the lead operators were the highest ranking employees present at the plant during the night and weekend shifts which constituted the majority of the facility's operating hours. In addition to assigning employees to specific tasks, lead operators had the authority to send employees home if they were ill. In the instant case, the lead persons are not highest ranking employees present during their shifts and cannot send employees home if they are ill. Finally, the Employer cites *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986), for the proposition that since the lead persons are answerable for the discharge of a duty or obligation or are accountable for the work product of the employees they direct that they responsibly direct others. This case involved an issue of whether directors, producers, associate producers, and assignment editors were supervisors. Although the evidence established that these individuals directed their coworkers, they were not held fully accountable and responsible for the performance and work product of the employees and thus, were not found to be supervisors. As in the case of the directors, producers, associate producers, and assignment editors, the lead persons in the instant case do not have the authority to hire, discharge, assign, reward, reprimand, and effectively evaluate coworkers.

